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In the Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION, PETITIONER

v.

INDIAN HEAD, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENT

CHARLES FRIED
Solicitor General

CHARLES F. RULE
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

KENNETH G. STARLING
Deputy Assistant Attorney General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

ROBERT B. NICHOLSON
JOHN J. POWERS, III
MARION L. JETTON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT D. PAUL
General Counsel

ERNEST J. ISENSTADT
Assistant General Counsel

DEAN C. GRAYBILL
FREDERICK E. DOOLEY, JR.
Attorneys
Federal Trade Commission
Washington, D.C. 20580

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QUESTION PRESENTED

The United States and the Federal Trade Commission will address the following question:

Whether petitioner's actions affecting the contents of the 1981 National Electrical Code adopted by the National Fire Protection Association, a private, voluntary membership organization, are shielded from liability under the Sherman Act, 15 U.S.C. (& Supp. IV) 1 *et seq.*, under the doctrine of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

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INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

The Department of Justice and the Federal Trade Commission have the primary responsibility for enforcing the antitrust laws. The courts have traditionally applied the antitrust laws to private standard-making organizations and their members,[1] and the Department and the Commission have engaged in enforcement actions against such organizations.[2] The Department and the Commission

[1] See, *e.g.*, *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556 (1982), aff'g 635 F.2d 118 (2d Cir. 1980); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961).

[2] See, *e.g.*, *American Society of Sanitary Engineering*, 106 F.T.C. 324 (1985) (consent decree); *United States* v. *American Society of Mechanical Engineers, Inc.*, 1972 Trade Cas. (CCH) ¶¶ 74,028, 74,029 (S.D.N.Y. 1972) (consent decree).

have an interest in assuring that the *Noerr*[3] doctrine is not interpreted to exempt from antitrust scrutiny anti-competitive activities conducted by members of private standard-making organizations.

STATEMENT

1. Carlon, a division of respondent Indian Head, Inc., manufactures and sells electrical non-metallic tubing (ENMT), a flexible plastic electrical conduit made from polyvinyl chloride, which is used in building construction to carry insulated electric wires. Respondent claims that ENMT has significant competitive advantages over steel conduit that performs the same function, including pliability, lower installed cost, and lower susceptibility to short-circuiting; in 1980, there was also a scientific basis for concern about the safety of ENMT, particularly in fires in high-rise buildings. The dispute in this case stems from respondent's efforts to have the National Fire Protection Association (NFPA) list ENMT as a permissible type of electrical conduit in the 1981 edition of the National Electrical Code (NEC). Pet. App. 3a-4a.

The NFPA is a private, voluntary organization with more than 31,500 individual and group members representing industry, labor, academic organizations, the insurance industry, and other interests. The NEC, which is revised every three years,[4] establishes product and per-

[3] See *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

[4] The revision of the NEC is a multi-step process. A proposed amendment is first submitted to a code-making panel composed of professionals with relevant technical expertise. No more than one-third of the membership of such a panel may represent a single interest. If approved by the panel, a proposal is transmitted to the full NFPA membership, where its fate is decided by majority vote. Members may appeal an adverse vote to the NFPA's Standards Council and ultimately to its Board of Directors. Finally, under a procedure

formance requirements for the design and installation of electrical wiring systems, including electrical conduit. The code is influential world-wide, and is adopted by a substantial number of state and local governments, either without change or with modest revisions. Pet. App. 4a-5a & n.1. Because many state and local governmental authorities rely on the NEC, a firm that wishes to market a new electrical product in a category covered by the NEC, such as electrical conduit, must as a practical matter obtain approval for that product in the NEC (C.A. App. 1557). Private certification laboratories, such as Underwriters Laboratories, also normally will not list and label an electrical product that is not approved by the NEC (C.A. App. 1558; Tr. 145-146, 300).

In 1978, respondent asked the NFPA to list ENMT as a permissible type of electrical conduit in the 1981 edition of the NEC (Pet. App. 6a; C.A. App. 1555). In December 1979, the NFPA code-making panel responsible for reviewing ENMT, after initially rejecting the product, approved it for inclusion in the 1981 NEC (Pet. App. 6a; C.A. App. 1561). This decision was then subject to approval by a simple majority of the members attending the NFPA's 1980 annual meeting (Pet. App. 5a).

Petitioner is a major domestic producer of steel conduit (Pet. App. 3a-4a). Recognizing that the NFPA's approval of respondent's product would be likely to harm sales of steel conduit, petitioner met with members of the steel industry and others to consolidate opposition to ENMT at the 1980 NFPA meeting. Petitioner and its confederates

known as a tentative interim amendment, a code-making panel, the Standards Council, and the Board of Directors may temporarily include a proposal in the Code on an interim basis until the next code cycle. Pet. App. 5a-6a. The NFPA publicly describes itself as using "widely accepted consensus procedures representing a balance of interests and opportunity for review and comment at all levels" and "one of the most democratic and procedurally fair systems of code development in existence" (C.A. App. 1988, 1991).

agreed to bring as many votes as possible to the upcoming NFPA meeting; petitioner itself pledged to bring at least 100 votes. *Id.* at 6a.[5] Petitioner eventually paid the NFPA membership dues and expenses for 155 persons, including its own executives, employees and sales agents, to join the organization and to attend the meeting, at a cost of more than $100,000 (*id.* at 7a; C.A. App. 1566).

At the NFPA meeting, petitioner instructed its personnel where to sit, and group leaders instructed the steel-group voters how to vote, using walkie talkies and hand signals to facilitate communication (Pet. App. 7a-8a; C.A. App. 1566-1567). Few of petitioner's voters understood the merits of the debate over respondent's product, and none spoke in oppositon to approval of ENMT during the meeting (Pet. App. 8a). At the conclusion, the NFPA members decided by a vote of 394-390 to return the ENMT proposal to committee (*ibid.*). If petitioner and its allies had not "packed" the meeting, ENMT would have been approved by the NFPA for inclusion in the 1981 NEC (see J.A. 24). Respondent appealed the membership's vote to the NFPA's Board of Directors, but the Board denied the appeal on the ground that the NFPA rules had been circumvented but not violated (Pet. App. 8a). Respondent thereafter applied for a temporary interim amendment to include ENMT in the 1981 NEC, but a subcommittee of the Board eventually denied respondent's request on the ground that the proposal did not contain appropriate emergency subject matter (*ibid.*; C.A. App. 1570).[6]

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[5] Prior to submission of the liability issue to the jury, petitioner conceded that it had agreed with other steel companies to oppose respondent's product (Pet. App. 9a; Tr. 2160).

[6] Subsequently, the NFPA amended its rules to prevent similar attempts to circumvent its rules (Pet. App. 21a; Tr. 307-308). In 1984, ENMT was approved for inclusion in the code, for use in buildings with three or fewer stories (Pet. App. 9a n.3; Tr. 258).

2. In October 1981, respondent brought suit in the United States District Court for the Southern District of New York, alleging that petitioner and others had unreasonably restrained trade in the manufacture and sale of tubing for use in above-ground electrical wiring in buildings, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1 (J.A. 4-7, 14).[7] A bifurcated trial was held. After the presentation of evidence on liability, the jury was instructed to apply the "rule of reason" and to determine whether petitioner and others had unreasonably restrained trade (Tr. 2160, 2165).[8] The jury returned a verdict in respondent's favor (J.A. 23-25). In answers to interrogatories, the jury also found that petitioner had not violated any NFPA rules or procedures but had subverted the NFPA's consensus standard-making process. In addition, the jury found that petitioner's actions adversely affected competition and constituted an unreasonable restraint of trade (J.A. 24-25).

The court then instructed the jury on damages. The court told the jury that it could not award respondent damages for petitioner's lobbying efforts before legislative and political bodies with respect to the safety of ENMT, but could award respondent damages for the losses it suffered through the exclusion of its product from the 1981 NEC (Pet. App. 9a n.3; Tr. 3266). The jury returned a verdict of $3.8 million in lost profits.

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[7] Respondent named both petitioner and the NFPA as defendants but dismissed its action against the NFPA before trial.

[8] The district court instructed the jury that it could find that standard-making has procompetitive aspects; that petitioner's conduct during the vote on ENMT had nonetheless been anticompetitive; and that if the anticompetitive effects of petitioner's actions outweighed any procompetitive benefits, respondent was entitled to prevail (Tr. 2164-2169).

3. The district court subsequently granted a judgment n.o.v. for petitioner, concluding (Pet. App. 23a-32a) that petitioner's actions were shielded from antitrust liability by the *Noerr-Pennington* doctrine. See *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America* v. *Pennington,* 381 U.S. 657 (1965). The court characterized the NFPA as "akin to a legislature" (Pet. App. 28a), and also reasoned that, because the NFPA's standards are routinely adopted by state legislatures, petitioner's lobbying efforts before the NFPA constituted "a genuine attempt to influence legislative action" (*id.* at 26a; see also *id.* at 30a). The court rejected respondent's argument that petitioner's actions before the NFPA were, in fact, a sham not entitled to immunity under *Noerr,* on the ground that petitioner had a legitimate concern about the safety of respondent's product (*id.* at 28a). The court concluded that petitioner could not be held liable for the injury to respondent that stemmed from the actions of private parties, because, in the court's view, respondent had not relied on that theory at trial (*id.* at 28a-29a, 31a).

4. The court of appeals reversed (Pet. App. 1a-22a). The court stated that respondent did not seek damages for any injury arising from the adoption of the NEC by state or local governments and that respondent was awarded damages only on the theory "that the stigma of not obtaining NEC approval of its product and [petitioner's] 'marketing' of that stigma caused independent marketplace harm to [respondent] in those jurisdictions permitting use of [polyvinyl chloride] conduit" (*id.* at 9a n.3). Viewing the case in that light, the court of appeals ruled that petitioner was not protected by *Noerr.*

The court declined to treat private standard-making bodies like the NFPA as if they were governmental bodies (Pet. App. 12a-17a). The court said, "*Noerr*'s holding depended on the unique nature of petitions directed to the

government in our political system; [this Court] focused upon the 'right of the people to inform their representatives in government of their desires with respect to the passage and enforcement of laws' " (*id.* at 13a (quoting 365 U.S. at 139)). The court stressed the need of governmental bodies for a free flow of information and the safeguards that protect the public interest in governmental action. By contrast, the court said, the NFPA, like other private standard-making organizations, is not accountable to the electorate but may be presumed to be acting primarily on its own behalf (Pet. App. 13a-15a). The court added that extending *Noerr* to so called "quasi-legislative" bodies, like the NFPA, would present serious practical problems about how to limit the scope of immunity (*id.* at 15a). The court concluded that the fact that governments routinely adopt provisions modeled on the NEC does not transform the NFPA into "a governmental organ" (*id.* at 16a-17a).

The court also rejected petitioner's argument that its efforts to lobby the NFPA were entitled to immunity under *Noerr* as indirect attempts to influence state and local governments (Pet. App. 17a-19a). Relying on the principle that exemptions from the antitrust laws are to be narrowly construed, the court explained that, while submission of a recommendation to the government is protected by *Noerr*, antecedent anticompetitive conduct outside the political arena that injures a rival is not entitled to immunity (*id.* at 17a-18a). The reason, it said, is that the policies underlying the *Noerr* doctrine do not justify immunizing anticompetitive conduct undertaken to persuade a private organization, because a party can always lobby state and local governments directly (*id.* at 18a). Finally, the court rejected petitioner's claim that any attempt to lobby state and local governments not to approve ENMT would have been futile once the NFPA endorsed that product. The

court pointed out that governments frequently modify the NEC before adopting it (*id.* at 18-19a).[9]

SUMMARY OF ARGUMENT

The court of appeals ruled correctly that petitioner's actions affecting the contents of the 1981 National Electrical Code are not protected by the *Noerr* doctrine. Neither the fact that the National Fire Protection Association follows forms and procedures that in some ways resemble those of a legislative body, nor the fact that the NEC has a foreseeable major influence on the contents of various state and municipal codes, turns petitioner's actions into "mere attempts to influence the passage or enforcement of laws." *Noerr*, 365 U.S. at 135.

The National Fire Protection Association is not a legislative body or part of government at any level, and attempts to influence its decisions are not protected by *Noerr* merely because the activities of NFPA members in reaching those decisions may bear some resemblance to political activities. The NFPA is a private, voluntary membership organization that "may be presumed to be acting primarily on * * * its own behalf," rather than in

[9] The court also rejected petitioner's claim that its conduct did not constitute an unreasonable restraint of trade as a matter of law (Pet. App. 19a-22a). Petitioner argued that an industry participant in a standard-setting organization should not be held liable under the antitrust laws when it is motivated (at least in part) by legitimate, scientifically justified safety concerns and when the organization's decisionmaking procedures are procedurally fair. The court rejected that argument on the ground that petitioner had subverted the integrity of the NFPA's procedures in order to obtain an anticompetitive result, and the court declined "to permit a defendant to use its literal compliance with a standard-setting organization's rules as a shield to protect such conduct fron antitrust liability" (*id.* at 21a). The court also ruled that petitioner's restraint of trade could not be justified on safety grounds (*id.* at 22a, citing *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397-398 (1927)).

the public interest. *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 45 (1985). Its voting members are not selected by, nor are they answerable to, the general public. And the constitutional right that underlay the decision in *Noerr*—the "right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws" (365 U.S. at 139)—has no direct application to attempts to influence persons who are not "representatives in government."

Nor does the fact that the NEC has a foreseeable major influence on the contents of many state and municipal codes immunize petitioner's activities. To be sure, the *Noerr* doctrine protects not only direct communications to "representatives in government" but also some indirect communications and some activities preliminary to direct or indirect communications with government representatives. But the activities alleged in this case do not fit into any of these protected categories.

First, the actions at issue in this case cannot be viewed as indirect communications to "representatives in government," or as preliminary steps in that process, because the NFPA is not permitted by the Internal Revenue Code to—and does not—attempt to influence state or local code-making. Its pertinent activity is to promulgate standards for various industries, which it then offers to the public. The mere fact that one of several consequences of the promulgation of standards by the NFPA is that some governmental bodies will enact those standards into positive law does not mean that any person's right to petition his government is traversed by holding NFPA members accountable under the antitrust laws for their conduct within the organization.

Second, in any event, the *Noerr* doctrine does not shield activities that are illegal (whether because they create unreasonable restraints of trade or otherwise) for reasons that are wholly independent of any restraint of trade

resulting from the governmental activity that the defendant wishes to bring about. An otherwise unlawful group boycott, for example, does not become protected activity merely because one of its objectives is to attract the attention of the legislature. The decision below was based on the conclusion that petitioner's actions created a stigma that injured respondent at times and in places where its product did *not* violate local codes. If petitioner's conduct constituted an unreasonable restraint of trade independent of any governmental actions that may have resulted from that conduct, such a restraint does not become lawful merely because governmental actions are one of its consequences.[10]

ARGUMENT

THE *NOERR* DOCTRINE DOES NOT SHIELD PETITIONER'S CONDUCT FROM SCRUTINY UNDER THE ANTITRUST LAWS

A. The *Noerr* Doctrine Shields Activities That Constitute Petitioning The Government

The *Noerr* doctrine originated in this Court's decision in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In that case, Pennsylvania truck operators and their trade association filed a Sherman Act complaint against 24 Eastern railroads, an association of the presidents of the railroads, and a public relations firm, alleging that the defendants had pursued a lobbying and public relations campaign that was designed to encourage the enactment and retention of laws and law enforcement practices that would be destructive of the trucking industry. 365 U.S. at 129-130, 138-139, 142-143. The Court ruled that the defendants could not be held liable under the Sherman Act for their activities. *Id.* at 135-145.

[10] We take no position on the second question presented by the petition, *i.e.*, the legality of petitioner's conduct under the Sherman Act assuming the inapplicability of *Noerr*.

Beginning with the premise, established in *United States* v. *Rock Royal Co-op.*, 307 U.S. 533 (1939), and *Parker* v. *Brown*, 317 U.S. 341 (1943), that a Sherman Act violation cannot be based on a restraint of trade that is the result of valid governmental action, the Court concluded that the Sherman Act does not prohibit private parties from banding together to lobby the legislature to create a restraint of trade in their favor. As the Court put it, there is an "essential dissimilarity" between an agreement to seek favorable government action and the type of agreements traditionally condemned by the Sherman Act. *Noerr*, 365 U.S. at 136-137. The Court also noted that construing the Sherman Act to reach efforts to petition the government would hamper the ability of government to act in the public good, because representative government depends on the ability of citizens freely to inform their representatives of their wishes. *Id.* at 137. That result, moreover, would impute to the Sherman Act "a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatsoever in the legislative history of that Act." *Ibid.* (footnote omitted). Finally, the Court found that applying the Sherman Act to the political conduct at issue in that case would infringe on the right to petition government protected by the First Amendment. *Id.* at 137-138. Accordingly, the Court held that the Sherman Act did not reach the activities of the railroads "at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws." *Id.* at 138. See also *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 669, 671 (1965); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-511 (1972) (stating that the *Noerr* doctrine rests on the First Amendment).[11]

[11] *Noerr* left open the question whether an ostensibly political campaign that is a sham to disguise an attempt to disrupt the business operations of a competitor is subject to the Sherman Act. *Noerr*, 365

Relying on *Noerr*, petitioner argues that it cannot be held liable for lobbying the NFPA to exclude respondent's product from the 1981 NEC, because its conduct was tantamount to an attempt to petition governmental bodies to reject respondent's product. That contention lacks merit for two reasons. First, the NFPA is a private organization, not the government, and persuading a private organization to take steps that injure a rival is not equivalent to petitioning the government to take governmental action that injures a rival. Second, petitioner's actions before the NFPA are not protected by *Noerr* as an indirect way of petitioning state and local governmental bodies. The NFPA may not and does not seek to influence state or local code-making, and in any event *Noerr* does not shield activities that are unlawful for reasons wholly independent of any restraint of trade resulting from governmental activity.

B. The NFPA Is Not A Governmental Body, And Petitioning The NFPA Does Not Amount To Petitioning The Government

The NFPA is a private, voluntary, membership organization, whose leadership and membership are neither elected by nor answerable to the body politic, and petitioner stipulated that the NFPA is not a governmental entity. Activities seeking to influence NFPA may bear some resemblance to political activities, but petitioner's efforts to cause the NFPA to exclude respondent's product from the 1981 National Electrical Code do not constitute efforts to lobby a governmental body under *Noerr*.[12]

U.S. at 144. The Court expressly endorsed that exception to *Noerr* in *California Motor Transport*, 404 U.S. at 515-516.

[12] The court of appeals in *Sessions Tank Liners, Inc.* v. *Joor Mfg. Co.*, 827 F.2d 458 (9th Cir. 1987), petitions for cert. pending, Nos. 87-687 and 87-916, on which petitioner relies heavily, also suggested that a standard-making organization may be quasi-governmental, and treated the private organization as the relevant legislative body in deciding whether the sham exception to *Noerr* was applicable. *Id.* at 463, 464-469.

Noerr shields political activity directed towards government. The Court's opinion in *Noerr* described conduct that involves "an attempt to persuade the legislature or the executive to take particular action" (365 U.S. at 136) and steps undertaken "in the political arena" (*id.* at 141). *Noerr* spoke of "an agreement jointly to seek legislation or law enforcement" (*id.* at 136), "associations [formed] for the purpose of influencing the passage or enforcement of laws" (*id.* at 137), the public's right "freely [to] inform the government of [its] wishes" (*ibid.*), "activities [that] comprised mere solicitation of governmental action with respect to the passage and enforcement of laws" (*id.* at 138), "seek[ing] action on laws" (*id.* at 139), and "depriv[ing] the government of a valuable source of information" (*ibid.*). Referring to the facts of the case, the Court also noted that the railroads' publicity campaign was "directed toward governmental action," was "designed to influence governmental action," was "a publicity campaign to influence governmental action" (*id.* at 140, 142-143), and was "a 'no-holds-barred fight' between two industries," which is "commonplace in the halls of legislative bodies" (*id.* at 144 (footnote omitted)). Actions taken to persuade a private organization not to approve a competitor's product do not fit any of these characterizations.

The *Noerr* decision was based on the notion that a governmental body may validly act in ways that restrain trade, and private persons may engage—and combine to engage—in activities seeking to persuade it to do so. 365 U.S. at 136. But this Court has long since made it clear that private entities are not governmental bodies for this purpose.[13] In *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), the Canadian govern-

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[13] Significantly, petitioner does not claim that the NFPA's standard-setting activities would constitute state action exempt from the antitrust laws. Nor would that claim have merit, since the NFPA is

ment had appointed a Union Carbide subsidiary as its wartime agent to purchase and allocate to Canadian industries the vanadium products they required. The plaintiff alleged that Union Carbide directed its subsidiary to exclude the plaintiff from the Canadian market as part of a conspiracy to monopolize the vanadium industry. Union Carbide argued that it was immune under *Noerr*, but this Court found that *Noerr* was "plainly inapposite" and that Union Carbide's conduct was "wholly dissimilar" to that of the railroads in *Noerr*. *Id.* at 707. *Noerr* was inapposite, because the purchasing agent in *Continental Ore* was not a public official and there was " 'no indication that the Controller or any other official within the structure of the Canadian Government approved or would have approved of ' " Union Carbide's practices. *Pennington*, 381 U.S. at 671 n.4 (citation omitted). The Court concluded that subjecting a party such as Union Carbide to liability "for eliminating a competitor from the Canadian market by exercise of the discretionary power conferred upon [its subsidiary] by the Canadian government would effectuate the purposes of the Sherman Act and would not remotely infringe upon any of the consitutionally protected freedoms spoken of in *Noerr*." *Continental Ore*, 370 U.S. at 707-708. See also *Feminist Women's Health Center, Inc.* v. *Mohammad*, 586 F.2d 530, 544-545 (5th Cir. 1978), cert. denied, 444 U.S. 924 (1979) (medical review organizations whose recommendations may be followed by a statutory board are not governmental bodies for purposes of *Noerr*).

The right to petition government is essential to a representative democracy because it allows citizens to

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a non-governmental entity, and its activities are not specifically authorized, nor subject to on-going supervision, by any government. See *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 57 (1985).

"communicate their will" to the legislature and government officials. 1 Annals of Cong. 738 (James Madison) (J. Gales ed. 1789). See also *McDonald* v. *Smith*, 472 U.S. 479, 482 (1985); *id.* at 486 (Brennan, J., concurring); *United States* v. *Cruikshank*, 92 U.S. 542, 552 (1875). That right is not involved in an attempt to influence a private standard-making organization. On the one hand, a private organization "may be presumed to be acting primarily on * * * its own behalf." *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 45 (1985). Members of standard-making organizations "may well view their position * * * at least in part, as an opportunity to benefit their employers," rather than the public. *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 571 (1982). And on the other hand, subjecting attempts to influence private standard-making bodies to antitrust scrutiny does not restrict the right of any person, including a member of such an organization, to "inform the government of [its] wishes" (*Noerr*, 365 U.S. at 137), or to enter into "an agreement jointly to seek legislation or law enforcement" or to "solicit[] * * * governmental action with respect to the passage and enforcement of laws" (*id.* at 136, 138). In particular, nothing in the decision below restricts the right of petitioner, alone or with other persons (including members of the NFPA), to urge any governmental body to adopt or enforce governmental policies hostile to the use of ENMT.

C. Petitioner's Efforts To Influence The NFPA Are Not Shielded By *Noerr* As An Indirect Means Of Petitioning Governmental Bodies

Petitioner contends (Br. 16-35) that even though the NFPA is not a governmental body, its conduct at the NFPA meeting constitutes a *Noerr*-protected indirect method of petitioning state and local legislatures. Petitioner maintains that it expected that excluding ENMT from the 1981 National Electrical Code would influence

state and local governments not to allow the use of that product. Petitioner therefore submits that its successful efforts to exclude ENMT from the 1981 NEC were a protected form of petitioning government, even though they were indirect both in their nature and their effect. That claim misconstrues the protection offered by the *Noerr* doctrine.

It is clear that the *Noerr*-protected right to petition government can take indirect forms. *Noerr* itself was explicit that the activities it protected include not only direct communications to legislators and other government officials but also various forms of indirect communication, as well as other preliminary, organizational, and preparatory steps.[14] In some cases, it may be difficult to draw the correct line between activity that is protected by *Noerr* and activity that is subject to scrutiny under the Sherman Act. This, however, is not a hard case, for two reasons.

1. The NFPA is not and cannot be the vehicle for petitioner or anyone else to petition state and local governments with respect to their building codes. The NFPA does not, and is not permitted to, attempt to influence legislation; it is a charitable organization, exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code, and is prohibited from attempting to influence legislation.[15] Accordingly, the NFPA's standard-

[14] In *Noerr*, the railroads' anti-trucking publicity campaign was directed at participants in the political process. 365 U.S. at 129-130, 140. While the publicity campaign did not involve direct solicitation of government action, it did take place "in the political arena" through efforts to convince the voters to put pressure on their elected representatives to restrain the truck operators and through publicity to sway government policy makers. *Id.* at 140-141.

[15] See IRS, *Pub. No. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1954*, at 861 (1986). The NFPA cannot maintain its status as a charitable organization under Section 170(c) of the Internal Revenue Code if it is disqualified under Section 501(c)(3) because of its "attempt[s] to influence legislation." 26 U.S.C. 170(c)(2)(D), 501(c)(3). Under Section 501(c)(3), an organization may qualify as a "charitable organization" only if "no substantial part" of its activities consists of an attempt to influence the government to pass legislation. See also Treas. Reg. 1.501(c)(3)-1(c)(3)(ii).

making process is not a "petitioning" activity, and petitioner's activities within the NFPA cannot, as such, be justified as an effort to set a direction for the NFPA preparatory to a petitioning campaign.[16]

Petitioner did, of course, hope and expect that state and local legislatures would look to the 1981 NEC for guidance, but nothing in *Noerr* suggests that an activity undertaken with the mere hope or expectation that some governmental bodies will take notice is exempt from scrutiny under the antitrust laws. This Court described the activities protected in *Noerr* as "political activities" undertaken "in the political arena." *Noerr*, 365 U.S. at 140-141. What the Court sought to protect was the right of the "people * * * freely [to] inform the government of their wishes" (*id.* at 137). In this case, the direct purpose and effect of petitioner's efforts at the NFPA convention were to prevent the inclusion of ENMT in the NEC, a

[16] Compare, *e.g.*, *United Mine Workers of America* v. *Illinois State Bar Ass'n*, 389 U.S. 217 (1967) (union's hiring of lawyers to prepare its members' claims for presentation to the government is protected petitioning activity); *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964) (individuals may join to recommend competent lawyers to each other as preparation for petitioning the courts); *Federal Prescription Service, Inc.* v. *American Pharmaceutical Ass'n*, 471 F.Supp. 126, 129-130 (D.D.C. 1979), aff'd in part and rev'd in part, 663 F.2d 253 (D.C. Cir. 1981), cert. denied, 455 U.S. 928 (1982) (*Noerr* protects effort by one organization to solicit other organizations to rally in a joint campaign to induce government action; court distinguishes attempt to exclude competitor through adoption of code of ethics).

private industry code. Although state and municipal governments ultimately might decide to adopt the NEC, in whole or in part, that governmental decision cannot be the result of any lobbying campaign by the NFPA.

Petitioner has the right, singly or in combination with others, to urge state and municipal legislatures to prohibit or restrict the use of respondent's product, and the *Noerr* doctrine insulates that activity from liability under the Sherman Act. As stated above, Sherman Act scrutiny of petitioner's activities within the NFPA would not in any way restrict petitioner's right to engage in "petitioning" activity; it would merely prevent petitioner from providing momentum to that activity by the misuse of an inherently nonpolitical organization.

2. The essence of *Noerr* is that the Sherman Act does not prohibit private persons from combining to restrain trade by enlisting the instrumentalities of government to impose retraints—even if the restraints themselves might otherwise be judged unreasonable, and even if the private persons' conduct is of the ugly sort that sometimes occurs in the rough-and-tumble of the political process. The Sherman Act was not intended to trump the right of government to regulate economic behavior, or the right of the citizenry to ask it to do so, whether or not the requests are "reasonable." Moreover, the Court made it clear in *Noerr* that "efforts to influence the passage and enforcement of laws" (365 U.S. at 142) do not lose *Noerr* protection merely because a rival may have "sustained some direct injury as an incidental effect of the * * * campaign to influence governmental action" (*id.* at 143).

The *Noerr* doctrine does not, however, shield actions that are illegal (whether because they create unreasonable restraints of trade or otherwise) for reasons that are wholly independent of any restraint of trade *resulting from* the governmental activity that the defendant wishes to bring about. No one would suggest that kidnapping a

legislator—even as a symbolic gesture—is a permissible way of communicating with the legislature. Nor should anyone suggest that price fixing, or a group boycott, is permissible even if its sole ultimate purpose is to attract the legislature's attention; the suggestion is particularly inapt if one of the objectives is to impose a direct restraint independent of any restraint resulting from governmental action.[17]

In the present case, the court of appeals understood (Pet. App. 9a n.3) that respondent prevailed because petitioner engaged in conduct that constituted unlawful restraint of trade without regard to the action of any governmental body. The court reasoned that such conduct did not become lawful under *Noerr* merely because one foreseeable consequence of the 1981 NEC was that various governmental bodies would adopt legislation that would impose restraints of their own. That reasoning, we submit, was correct.

The restraint of trade that respondent alleged in this case was not the exclusion of respondent's product from local building codes but the actions of petitioner in excluding ENMT from the NEC.[18] Respondent contended, inter alia, that this action injured it in jurisdictions that permitted a product not listed in the NEC to be used. (For instance, private organizations such as Underwriters

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[17] We are not here invoking the so-called "sham' exception to the *Noerr* doctrine. See 365 U.S. at 144. We assume that petitioner's hope that legislation would be adopted was both genuine and one of the motivating forces. Our point is that activity that is unlawful on its own terms is not made lawful by the fact that one of its motives is a desire to influence the adoption of legislation.

[18] Petitioner therefore misses the point in arguing (Br. 39-41) that the state action doctrine protects it from liability for its actions during the 1980 NFPA meeting, on the ground that the doctrine "precludes Sherman Act recovery for trade restraints imposed by legislative enactments." Respondent was not awarded damages for that injury.

Laboratories rely on the NEC listing in evaluating and approving electrical products.) This injury appears to have been measured by the jury here: The district court instructed the jury that in determining damages it could consider the stigma of exclusion from the 1981 NEC and that it could not award damages premised on any lobbying activities on petitioner's part (see Tr. 3264-3267); the jury, so instructed, returned a $3.8 million damage award.[19]

Petitioner's claims (Br. 32-33) that it was pursuing a successful "grass roots" lobbying campaign, that it was "generat[ing] public pressure for or against legislation," and that its activities were analogous to trade association lobbying, simply ignore the fact that its conduct allegedly included an unlawful restraint of trade that was complete in itself without regard to any legislative response. *Noerr* protects the right to seek governmental restraints on competitors. It does not shield completed wrongs committed on the way to the legislature. Cf. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 912-915 (1982) ("right of business entities to 'associate' to suppress competition may be curtailed").[20]

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[19] Petitioner ignores the effect of its actions on respondent in the private arena when it claims (Br. 21, 22, 40-41) that its actions before the NFPA "did not in themselves have any anticompetitive effect" and that the injury to respondent, "if any, was caused by the adoption of the NEC by the various state legislatures."

[20] In *Claiborne Hardware*, the Court noted that it did not need to decide "the extent to which a narrowly tailored statute designed to prohibit certain forms of anticompetitive conduct or certain types of secondary pressure may restrict protected First Amendment activity." 458 U.S. at 915 n.49. See also *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 697-698 & n.27 (1978) (First Amendment right of free speech and petition does not prevent enforcement of injunction prohibiting anticompetitive provision of an industry code); *California Motor Transport*, 404 U.S. at 513-515 (First Amendment right of free speech does not prohibit government regulation of anticompetitive agreements); *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 497-504 (1949) (same).

Petitioner claims (Br. 25) that if it was to squelch competition from ENMT it had to do so by excluding ENMT from the NEC because in many jurisdictions lobbying against the NEC is a fruitless endeavor. Even if that claim were true,[21] it would hardly justify affording petitioner immunity. The fact that an activity obtains legislative results does not prove that it is protected petitioning. In a variety of similar contexts, commercial schemes for dramatizing a cause and focusing governmental attention have been found to violate the antitrust laws when they restrain competition.[22] Petitioner's argument would immunize the adoption of private restraints, whether or not reasonable, whenever the private parties developing them hope and expect that at some future point their work product will be adopted by one or more governmental entities. The courts of appeals, however, have repeatedly rejected

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[21] It may well be exaggerated. The court of appeals pointed out that more than half of the states and cities polled by petitioner amended the NEC before adopting it or declined to adopt it at all (Pet. App. 18a-19a; *id.* at 4a-5a n.1). That evidence undercuts petitioner's claim that lobbying local governments is fruitless.

[22] See, *e.g.*, *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia*, 624 F.2d 476, 482 (4th Cir. 1980), cert. denied, 450 U.S. 916 (1981) (Blue Shield Plans' collaboration in defiance of state statute, which may have been designed to force the state to bring a lawsuit that would produce a judicial resolution of the plans' grievances, was not petitioning protected by *Noerr*); *Osborn* v. *Pennsylvania-Delaware Serv. Station Dealers Ass'n*, 499 F. Supp. 553, 555-558 (D. Del. 1980) (service station owners' joint refusal to serve public, intended to force federal agency to amend price control regulations, was not protected by *Noerr*); *Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510 (1986), appeal pending, No. 86-1465 (D.C. Cir.) (boycott by government-paid lawyers directed at obtaining higher government payments not *Noerr*-protected). But see *Crown Central Petroleum Corp.* v. *Waldman*, 486 F. Supp. 759 (M.D. Pa.), rev'd on other grounds, 634 F.2d 127 (3d Cir. 1980).

claims of immunity for private restraints notwithstanding the hope or expectation of governmental endorsement.[23]

Finally, petitioner argues (Br. 23, 31-35) that, unless *Noerr* applies in this case, the fear of antitrust liability will paralyze private standard-making organizations. That dire prediction is based on questionable assumptions and, in any event, is beside the point. Standard-making organizations present opportunities for collusive action to restrain competition. If there are sound policy arguments for immunizing conduct before such organizations, those arguments should be addressed to Congress.[24] Petitioner's conduct does not fit within the boundaries of the *Noerr* doctrine, and that doctrine should not be distorted on the basis on dubious policy arguments.

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[23] For example, the Second Circuit has held that the tariffs put into effect by AT&T are not protected under *Noerr* simply because they were filed with FCC. *Litton Systems, Inc.* v. *AT&T*, 700 F.2d 785, 806-809 (1983), cert. denied, 464 U.S. 1073 (1984). See also *Mid-Texas Communications Systems, Inc.* v. *AT&T*, 615 F.2d 1372, 1382-1383 (5th Cir.), cert. denied, 449 U.S. 912 (1980) (AT&T's refusal to interconnect, made prior to FCC involvement, is not covered by *Noerr*); *City of Kirkwood* v. *Union Electric Co.*, 671 F.2d 1173, 1180-1181 (8th Cir. 1982), cert. denied, 459 U.S. 1170 (1983) (*Noerr* does not cover all attempts to manipulate the government; filing of rate request not covered by *Noerr*). The Fifth Circuit has held that communications within medical review committees are not protected by *Noerr*, even though a committee's recommendations may be adopted by a state board. *Feminist Women's Health Center, Inc.* v. *Mohammad*, 586 F.2d at 545. Cf. *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 601-602 (1976) (plurality opinion) (privately-developed utility marketing program filed as a tariff with a state public service commission is not within the scope of *Noerr* immunity, where *pro forma* state approval "amounts to little more than approval of a private proposal").

[24] Similar arguments have frequently been made to Congress by a variety of industries. In some cases, Congress found those arguments persuasive and enacted legislation to alter the statutory regime. See, *e.g.*, National Cooperative Research Act of 1984, 15 U.S.C. (& Supp. IV) 4301 *et seq.*; Newspaper Preservation Act, 15 U.S.C. 1801 *et seq.*; Local Government Antitrust Act of 1984, 15 U.S.C. (& Supp. IV) 34 *et seq.* Congress rarely grants an industry an automatic, outright immunity. See Health Care Quality Improvement Act of 1986, Pub. L. No. 99-660, 100 Stat. 3784 (to be codified at 42 U.S.C. 11101-11152) (immunity from certain damage actions). Most often, Congress does not act on a request for immunity.

Virtually all private commercial conduct is subject to antitrust scrutiny. Far from paralyzing such conduct, the antitrust laws, when properly applied, facilitate commercial conduct that benefits the public by inhibiting unreasonable private restraints of trade. There is no reason to believe that subjecting private standard-making organizations to the antitrust laws will paralyze them.[25] Moreover, the record of antitrust enforcement in this area refutes petitioner's claim that standard-making organizations will be "chilled" unless they are afforded immunity. Private litigants have brought Sherman Act claims against such organizations and their participants for decades.[26] Yet the private standard-making system has blossomed from nearly 14,000 active standards in 1964 to approximately 30,000 standards today.[27]

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[25] Petitioner asserts (Br. 25-26) that although it has the alternative of direct petitioning of state and local governments, this is "at best irrelevant under *Noerr*." In fact, the availability of alternative means of asserting First Amendment rights is a consideration in evaluating the reasonableness of government restrictions on such rights. *E.g.*, *Pell* v. *Procunier*, 417 U.S. 817, 824 (1974).

[26] *E.g.*, *American Society of Mechanical Engineers* v. *Hydrolevel Corp.*, *supra*; *Structural Laminates, Inc.* v. *Douglas Fir Plywood Ass'n*, 399 F.2d 155 (9th Cir. 1968), cert. denied, 393 U.S. 1024 (1969); *United States* v. *National Malleable & Steel Castings Co.*, 1957 Trade Cas. ¶ 68, 890 (N.D. Ohio 1957), aff'd per curiam, 358 U.S. 38 (1958).

[27] *Hearings on S.J. Res. 33 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 14 (1967); Nat'l Bureau of Standards, *NBSIR 87-3576, The ABC's of Standards-Related Activities in the United States* 1 (May 1987).

Private standard-making organizations play an important role in the marketplace. But as this Court observed in *Hydrolevel*, such organizations may have power that can " 'result in economic prosperity or economic failure, for a number of businesses of all sizes throughout the country,' as well as entire segments of an industry." 456 U.S. at 570 (quoting H.R. Rep. 1981, 90th Cong., 2d Sess. 75 (1968)). Private standard-making also "can be rife with opportunities for anticompetitive activity" (456 U.S. at 571), in part because the proceedings of such organizations are conducted in private and are not open to public scrutiny. Compare *Town of Hallie* v. *City of Eau Claire*, 471 U.S. at 45 n.9. Application of the antitrust laws to standard-making organizations is necessary to assure the survival of competitive conditions in those industries that engage in such activities.[28] Petitioner's argument that private standard-making should be immunized from the antitrust laws should be addressed to Congress, which alone has the power to grant the exemption that petitioner seeks. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 689 (1978).

[28] The NFPA has already amended its rules to prevent a similar subversion of its procedures. Thus, contrary to the *Sessions'* court's concerns (827 F.2d at 463-464), subjecting the conduct of members of standard-making organizations to antitrust scrutiny will not interfere with the free flow of information to state and municipal governments. Nor is it likely that the possibility of antitrust liability of members of standard-making organizations will discourage these groups from continuing their useful contributions, given the substantial commercial benefits of uniform industry standards. See, *e.g.*, Howe & Badger, *The Antitrust Challenge to Non-profit Certification Organizations*, 60 Wash. U.L.Q. 357, 377-380 (1982).

CONCLUSION

The judgment of the court of appeals that petitioner's actions are not entitled to *Noerr* immunity should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General
CHARLES F. RULE
Assistant Attorney General
LOUIS R. COHEN
Deputy Solicitor General
KENNETH G. STARLING
Deputy Assistant Attorney General
PAUL J. LARKIN, JR.
Assistant to the Solicitor General
ROBERT B. NICHOLSON
JOHN J. POWERS, III
MARION L. JETTON
Attorneys

ROBERT D. PAUL
General Counsel
ERNEST J. ISENSTADT
Assistant General Counsel
DEAN C. GRAYBILL
FREDERICK E. DOOLEY, JR.
Attorneys
Federal Trade Commission

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